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In the Supreme Court of the United States

No. 469.

OCTOBER TERM, 1960.

THOMAS W. ALEXANDER,
Petitioner,

vs.

BUCKEYE CELLULOSE CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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To the United States Court of Appeals For the Sixth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on July 18, 1960.

OPINIONS BELOW.

The opinion of the District Court is not reported. The opinion of the Court of Appeals has not been reported at this time. The opinions are reproduced.

JURISDICTION.

The judgment of the Court of Appeal was entered on July 18, 1960. This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED.

This is an action in the U. S. District Court in Tennessee by a citizen of North Carolina against a corporation under the laws of Ohio domesticated in Tennessee on a merger agreement which, as alleged in the amended complaint,

> "provided the defendant Buckeye Cellulose Corporation should be the Continuing Corporation and that as Continuing Corporation all liabilities of the Constituent Corporations should attach to it."

The merger agreement was executed in accord with the statute of Ohio dealing with the merger of corporations. The original liability of the Corporation which petitioner says was included in the provision quoted above, accrued under the laws of Florida, and both the District Court and the Court of Appeals held the remedy on the original liability barred by a three-year Florida Statute of Limitations, and further held that the merger agreement had no legal significance, the Court of Appeals stating in its opinion that there was no intent on the part of the parties that the merger agreement should be a new promise and create responsibility.

STATUTE INVOLVED.

Title 28, United States Code, Sec. 1652, 62 Stat. 944. provides as follows:

> "The laws of the several states, except where the constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the Courts of the United States, in cases where they apply."

RULE INVOLVED.

Rule 19 (b) of this Court is also basis of this petition.

STATEMENT OF THE CASE.

This action was brought in January 1958 by Thomas W. Alexander (hereinafter called the Petitioner) against Buckeye Cellulose Corporation, an Ohio corporation (hereinafter called the Corporation) to recover for services rendered the Corporation. There was a demand for a jury allowed by the District Court.

Liability for the services had been denied by a letter written in Florida in February 1952 and a cause of action arose then and there. Both courts held a three-year Florida Statute of Limitations set up as a defense applied. The complaint was amended on March 11, 1959, prior to the decision of the District Court, to allege that in October 1955 a cause of action arose because the Corporation executed a merger agreement which

> "provided the defendant Buckeye Cellulose Corporation should be the Continuing Corporation and that as Continuing Corporation all liabilities of the Constituent Corporations should attach to it."

The Corporation contended that the merger agreement created no responsibility or new promise, relying on Ohio Code Sec. 1701.81 and also *Board of Commissioners of Caddo Levee District vs. Pure Oil Company*, 167 La. 801, 120 So. 373 (1929).

The District Court granted summary judgment for the Corporation on the ground that the Florida three-year Statute of Limitations was a conclusive defense. The Court of Appeals affirmed, saying:

> "The only case in which a problem similar to the present problem was found was Board of Commissioners of Caddo Levee District vs. Pure Oil Co., 167 La. 801, 120 So. 373 (1929) which reached the same result as the District Court in this case. The finding of a new promise to pay which would start the Statute of Limitations running again must necessarily be dependent

upon the intent of the parties. Even the plaintiff in this case does not contend that the parties to the merger intended that the resultant corporation should be responsible for any debts except those for which the prior companies were legally liable."

REASONS FOR GRANTING THE WRIT.

First. The opinion in this case, though a jury was demanded, is that the "intent" of the merger agreement is a question of law. The Court disposed of the case by holding that the parties did not intend to include the "revival" of the obligation within the terms of the merger agreement. This is in conflict with this Court in two cases: *American Stevedores, Inc. v. Porello*, 330 U. S. 346 (at p. 458), and *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corporation*, 350 U. S. 124 (at p. 144). Not only is the opinion contrary to the holdings of this Court, it conflicts with the holding of the Court of Appeals for the Third Circuit in the case of *Renault v. L. N. Renault & Co.*, 188 Fed. 2d. 317, where "intent" was held for a jury.

Second. The opinion is in conflict with *Leyman Corp. v. Piggly-Wiggly Corp.*, 90 Ohio Appeals 506; 103 N. E. 2nd 399. There the Ohio law is stated. The holding is significant because the Court found that the obligation sued on *was valid though unknown to the assuming party* at the time of the assumption agreement. The case is summed up on the 1954 Supplement to *Restatement of Contracts*, Section 139 at p. 365, where the statement is made that an agreement created an assumption "notwithstanding such lease was not a liability in contemplation when the debts of lessee were assumed * * *." Standard law encyclopedias say that intent is a question of fact. 88 *C. J. S.*, Trials. C. 219, p. 502 and 53 *Am. Jur.*, Trial, S. 219.

Third. The opinion concludes that the "merger agreement required the Buckeye Cellulose Corporation to pay only those obligations which were legally enforceable at the time of the merger." The conclusion is that the Florida three-year statute destroyed, extinguished or wiped out the obligation. We submit it did not do so. No Florida case was cited to support this conclusion. The Court of Appeals relied on a Louisiana case, *Board of Commissioners of Caddo Levee District v. Pure Oil Co.*, 167 La. 801; 120 So. 373. Our insistence is that the law of Florida is not that its Statute of Limitations extinguishes an obligation. A Florida decision which holds the statute does not extinguish an obligation is *Danielson v. Line*, 185 So. 332; 135 Fla. 585. That case states that the law in Florida with respect to the Statute of Limitations does not extinguish the obligation. "It in no wise affects the debt or obligation * * *." Furthermore, in the Florida case of *Courtlandt Corp. v. Whitmer*, 121 So. 2d 37, decided June 1st, 1960, there is a closely reasoned discussion of this question of extinguishment. It again indicates that an obligation is not extinguished by the Florida Statute of Limitations.

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

JAC CHAMBLISS,
1111 Maclellan Building,
Chattanooga, Tennessee,
Attorney for the Petitioner.

October 3, 1960.

APPENDIX.

MEMORANDUM OPINION OF DISTRICT COURT.

(Filed April 13, 1959.)

Several motions are before the Court in this case. The motion for summary judgment filed by the defendant will be discussed first.

The defendant offers a number of reasons why a summary judgment should be granted to it. It is sufficient to consider only one proposition to determine the motion.

The defendant asks for a summary judgment because the suit is barred by the Tennessee statute of limitations. The services of the plaintiff on which this suit is based were performed more than six years prior to the bringing of this suit. The plaintiff seeks to overcome this admitted fact by claiming first that defendant had an implied contract to pay him, by making him chief forester and wood procurer of the new operation, and the statute began to run in February, 1952, when that contract was broken; and second that the merger of the defendant with the Buckeye Cotton Oil Company created a novation, or new contract, and this started a new running of the statute of limitations.

The second of these contentions is clearly without merit. Although the word "novation" is sometimes used by the courts in describing the rights of creditors against consolidated corporations, see 14a, C. J. 1073, 19 C. J. S. 1394, the meaning is not used in its technical sense—as the establishment of a new contract—but means only that the new corporation is liable for the old debts, no more and no less.

Most important to the first contention is the effect of the Tennessee Code Annotated, Section 28-114, which reads:

> Where the statute of limitations of another state or government has created a bar to an action upon a cause accruing therein, while the party to be charged was a resident in such state or such government, the bar is equally effectual in this state.

All of the services sued for were performed in Florida. The cause of action therefore accrued in Florida far more than three years before this suit was filed, and the Florida statute of limitations is three years. The defendant could have been sued in Florida at any time since the accrual of the right, the defendant having been in business there ever since the rendering of the services which are the subject of this suit. In other words, the Tennessee period of limitations in this case is, by derivation from the Florida law, three years, not six, and the precise time when the statute began to run is therefore of no importance, because there is no controversy about the fact that the cause of action accrued more than three years prior to the filing of this suit.

The defendant's motion for summary judgment is granted. The fact that this motion is granted makes all other motions of no significance.

Order accordingly.

LESLIE R. DARR,
United States District Judge.

MEMORANDUM TO CLARIFY OPINION.

(Filed May 7, 1959.)

The original opinion passing on the defendant's motion for summary judgment in this case failed to specifically pass on the other motions pending. This memorandum is written to clarify that point.

The plaintiff's motion to amend the complaint to add a statement regarding the merger of the Buckeye Cellulose Corporation with the Buckeye Cotton Oil Company is granted, the merger having been considered in the factual background on which the original opinion is based.

The defendant's motion for summary judgment having been granted, all other motions are now denied.

LESLIE R. DARR,

United States District Judge.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Decided July 18, 1960.)

Before SIMONS, Senior Circuit Judge, POPE, Circuit Judge, and KENT, District Judge.

KENT, District Judge. This is an appeal from the entry of a summary judgment for the defendant by the District Court.

The plaintiff was employed by the Buckeye Cotton Oil Company and performed services which terminated prior to February, 1952. This suit was instituted to recover payment for such services. The suit was commenced on January 31, 1958, by the filing of a complaint in the United States District Court for the Eastern District of Tennessee. The defendant company was merged with the Buckeye Cotton Oil Company by an agreement of merger dated October 28, 1955. Both corporations were organized under the laws of the State of Ohio. The defendant relies upon the three year statute of limitations applicable to such actions as this, under the laws of the State of Florida, and also upon Section 28-114, Tennessee Code Annotated, which provides:

> "Where the statute of limitations of another state or government has created a bar to an action upon a cause accruing therein while the party to be charged was a resident in such state or such government, the bar is equally effectual in this state."

The District Court held that under the above provision of the Tennessee Code plaintiff's cause of action was barred, the cause of action having accrued in Florida, and applied the Florida three year statute of limitations, and entered summary judgment for the defendant.

Plaintiff contends that the merger agreement between the Buckeye Cotton Oil Company and the Buckeye Cellulose Corporation, which required Buckeye Cellulose Corporation to assume all the liabilities and obligations of the Buckeye Cotton Oil Company was a new promise which obligated the Buckeye Cellulose Corporation to pay the debts of the Buckeye Cotton Oil Company even though the right to recover for such debts may have been previously barred by the applicable statute of limitations.

At the time of the arguments in this Court, plaintiff's counsel conceded that the District Judge was correct in concluding that plaintiff's cause of action was barred by the Florida statute of limitations, and the Tennessee statute set forth above, unless such cause of action was "revived" by the merger agreement.

There have been some instances in which a merger prior to the running of the limitations period has been held to toll the statute of limitations on the basis that a new promise to pay has been found. *Mitchell v. Liberty Clay Products Co.*, 291 Pa. 282, 139 A. 853.

The only case in which a problem similar to the present problem was found was *Board of Commissioners of Caddo Levee District v. Pure Oil Co.*, 167 La. 801, 120 So. 373 (1929), which reached the same result as the

District Court in this case. The finding of a new promise to pay which would start the statute of limitations running again must necessarily be dependent upon the intent of the parties. Even the plaintiff in this case does not contend that the parties to the merger intended that the resultant corporation should be responsible for any debts except those for which the prior companies were legally liable.

This Court is in complete accord with the conclusions reached by District Judge Darr, that the merger agreement required the Buckeye Cellulose Corporation to pay only those obligations of its predecessors which were legally enforceable at the time of the merger.

The judgment of the District Judge is affirmed.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed July 18, 1960.)

Appeal from the United States District Court for the Eastern District of Tennessee.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

/s/ W. WALLACE KENT,

United States District Judge.

(Sitting by designation.)